TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 388

WELKER B. BROOKS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 389

JAMES M. BROOKS, ADMINISTRATOR OF THE ESTATE OF ARTHUR L. BROOKS, DECEASED, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 30, 1948.

CERTIORARI GRANTED JANUARY 3, 1949.

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEB. 7, 1949.

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5758

UNITED STATES OF AMERICA, Appellant,

versus

WELKER B. BROOKS, Appellee.

No. 5759.

UNITED STATES OF AMERICA, Appellant,

versus

JAMES M. BROOKS, Administrator of the Estate of Arthur L. Brooks, Deceased, Appellee.

Appeals from the District Court of the United States for the Western District of North Carolina, at Charlotte

Appendix to Brief of Appellant

APPENDIX "A"

Section 410 (a) of the Federal Tort Claims Act (60 Stat. 843, as amended, 28 U. S. C. 931 (a)) provides:

> Sec. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to

the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages: *Provided, however,* That in any case wherein death was caused, where the law of the place where the act or omission complained of occurred, provides or has been construed to provide, for damages only punitive in nature, the United States [fol. 2] shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons, respectively, for whose benefit the action was brought, in lieu thereof. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

[fol. 3] APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

Charlotte Civil No. 545

WELKER B. BROOKS, Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant

COMPLAINT

The plaintiff, complaining of the defendant, says and alleges:

1. That the plaintiff is a resident of Mecklenburg County, North Carolina.

2. That on the evening of February 17, 1945, the plaintiff and his father, James M. Brooks, and his brother, Arthur L. Brooks, were riding in a two-seated Chevrolet Sedan

belonging to the plaintiff's brother, Arthur L. Brooks; that on said occasion, the said automobile was being driven by the plaintiff's brother, Arthur L. Brooks, the plaintiff's father, James M. Brooks, sitting in the front seat of said automobile beside the plaintiff's brother, Arthur L. Brooks, and the plaintiff sitting alone in the rear seat of said automobile.

3. That at about eight o'clock P. M., after dark on the evening of the aforementioned date, the plaintiff and his father and brother above named were traveling in the aforesaid automobile on a paved highway from Fayette-[fol. 4] ville, North Carolina, to Fort Bragg, North Carolina, the plaintiff's aforesaid brother, Arthur L. Brooks, being at that time a member of the United States Military Forces, on furlough and at that time visiting his said brother at Fort Bragg; that while thus proceeding, the plaintiff and his father and brother approached a point where said highway intersects another paved highway; that on said occasion it was the intention of the plaintiff and his father and brother to enter on to the second highway and proceed thereon the remaining distance to Fort Bragg, but that in order to do so, it was first necessary to cross over half of the second highway in order to get upon the farther lane thereof, on which traffic moved in the direction of Fort Bragg.

4. That upon arriving at the said second highway and before entering thereon, the plaintiff's brother, Arthur L. Brooks, brought the aforesaid automobile to a complete stop; that it appearing that no vehicle was approaching, the said Arthur L. Brooks started his said automobile across the nearer lane of the said highway in order to get upon the farther lane thereof, as hereinabove set forth; that his said automobile had almost cleared the said lane which it was crossing when suddenly it was struck on its left side with terrific force by a motor vehicle traveling, as the plaintiff is informed and believes, without any lights, at a very rapid, excessive, and unlawful rate of speed; that as a result of said motor vehicle striking the said Chevrolet automobile which the said Arthur L. Brooks was driving, the plaintiff was painfully, seriously, and permanently injured.

5. That, as the plaintiff is informed and believes, the motor vehicle which struck the aforesaid Chevrolet automobile was a large motor truck belonging to the United States Army and operated for and in behalf of the United [fol. 5] States Army through its authorities at the military post of Fort Bragg, North Carolina; that said motor truck as the plaintiff is informed and believes, was being operated and driven on the occasion herein referred to by a civilian employee of the defendant, who, as the plaintiff is informed and believes, was operating and driving the said motor truck on the said occasion within the scope of his employment.

6. That the said employee of the defendant was operating and driving the said motor truck on the said occasion in a careless and negligent manner in that he was operating and driving the same at an excessive and unlawful rate of speed, in the dark without any lights thereon, without reasonable and proper attention and regard under the circumstances for the rights of persons in the position of the plaintiff, without reasonable and proper warning under the circumstances to persons in the position of the plaintiff, and without reasonable and proper control of said motor truck, under all the then and there existing circumstances; that such negligence on the part of the defendant's employee was the direct and proximate cause of the injury to the plaintiff hereinabove and hereinafter referred to.

7. That as a result of the aforesaid motor truck striking the automobile in which the plaintiff was riding on the occasion, and under the circumstances hereinabove set forth, the plaintiff's body was severely bruised and his entire nervous system deeply and permanently shocked; that his skull was badly fractured and the nerves and other vital tissue of his brain severely and permanently injured; that as a result of said injuries, the plaintiff has incurred substantial medical expenses, has suffered a loss of earning capacity, and loss of the normal use of his faculties, and [fol. 6] has endured long and severe pain and suffering.

8. That by reason of the matters hereinabove set forth, the plaintiff is entitled to recover of the defendant the sum of $25,000.00.

9. That the plaintiff is entitled to maintain this action against the defendant by virtue of the provisions of the

"Federal Tort Claims Act," the same being Title IV of the Legislative Reorganization Act of 1946, enacted by the Congress of the United States.

Wherefore, the plaintiff prays that he have and recover judgment of the defendant in the sum of $25,000.00, together with the costs herein.

W. S. Blakeney, Guthrie, Pierce & Blakeney, Johnston Building, Charlotte, North Carolina, Attorneys for the Plaintiff.

IN UNITED STATES DISTRICT COURT

ANSWER (WELKER B. BROOKS CASE)

The Defendant, answering the complaint of the Plaintiff, says:

1. That Paragraph One of plaintiff's complaint is not denied.

2. In answering Paragraph Two of plaintiff's complaint, it is admitted that plaintiff was an occupant of the automobile driven by Arthur L. Brooks on February 17, 1945. Defendant does not have sufficient information as to the position of the other occupants of said automobile, and the remaining portion of said paragraph is therefore denied.

3. In answering Paragraph Three of plaintiff's complaint, defendant does not have sufficient information as to the truth of the matters alleged therein, and therefore denies same.

[fol. 7] 4. In answering Paragraph Four of plaintiff's complaint, defendant admits that plaintiff's automobile stopped before entering highway No. 87. The remaining allegations are untrue and therefore denied.

5. In answering Paragraph Five of plaintiff's complaint, it is admitted that the truck was the property of the defendant and was being operated by a civilian employee. The remaining portion of said paragraph is denied.

6. Paragraph Six of plaintiff's complaint is untrue and is therefore denied.

7. In answering Paragraph Seven of plaintiff's complaint, the defendant has no knowledge of the extent of plaintiff's injury, but expressly denies that defendant by any act on its part or on the part of its employee or driver in anywise caused or contributed to said injury.

8. Paragraph Eight of plaintiff's complaint is untrue and is therefore denied.

9. In answering Paragraph Nine of plaintiff's complaint, it is admitted that certain actions may be instituted under the Federal Tort Claim Act.

Further Defense

1. That the defendant was at no time guilty of negligence, carelessness, wrongful or unlawful conduct upon the occasion hereinabove mentioned as its vehicle was proceeding on highway No. 87 on the right-hand side of the road in a one-way lane in a careful, cautious, and prudent manner on a highway clear of traffic with the exception of plaintiff's automobile which had stopped at said intersection and was apparently waiting for defendant's vehicle to pass. That the injury sustained by plaintiff as a result of said collision [fol. 8] arose solely and exclusively from and was proximately caused and produced by the negligent, careless, reckless, wrongful, and unlawful acts and conduct of plaintiff, and the driver in whose car he was a passenger, the negligence of said driver being therefore imputed to the plaintiff herein.

2. That without waiving any of the foregoing defenses, but specifically relying upon same, the defendant avers that even if it was guilty of negligence, wrongful or unlawful conduct upon the occasion of said accident, all of which is expressly denied, the negligent, wrongful and unlawful acts and conduct of the plaintiff was:

(a) That the vehicle in which plaintiff was driving or riding as a passenger, after making a complete stop at a stop signal posted at the intersection of the Old Fort Bragg road as it entered highway No. 87, failed to observe the condition of traffic passing over highway No. 87, which was then and is now an arterial highway, and without warning, the driver of said vehicle suddenly moved said vehicle from a completely stopped position directly into the path of

defendant's vehicle causing said vehicle to crash into the automobile which plaintiff was driving or riding in as a passenger.

(b) The vehicle in which plaintiff was driving or riding in as a passenger was being operated in such a manner and in a wilful and wanton disregard of the rights and safety of others and without due caution and circumspection and in a manner so as to endanger or likely to endanger persons or property upon said highway.

That said acts constituted contributory negligence upon the part of the plaintiff and that said wrongful, negligent and unlawful acts and conduct are hereby expressly pleaded as contributory negligence and a bar to any recovery by the plaintiff herein.

[fol. 9] Wherefore, having fully answered the complaint of the plaintiff, the defendant prays:

1. That the plaintiff have and recover nothing of the defendant in this action, and that said action be dismissed.

2. That the plaintiff be taxed with the costs, and have such other and further relief as the defendant may be lawfully entitled.

David E. Henderson, United States Attorney. W. M. Nicholson, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

FURTHER ANSWER AND DEFENSE (WELKER B. BROOKS CASE)

After leave of the Court first had and obtained, the defendant, the United States of America, files this amended answer and further defense.

1. That at the time the plaintiff, Welker B. Brooks, claims to have been injured on the 17th day of February, 1945, he was in the military service of the United States of America located at Fort Bragg, North Carolina.

2. That the plaintiff Welker B. Brooks made application to the Veterans' Administration, acting on behalf of the United States of America, for compensation and was

awarded compensation in the amount of $23.00 per month for a disability from April 1, 1946 to August 31, 1946, and $27.60 per month from September 1, 1946, to continue as long as he remains disabled.

3. That the defendant United States of America has been paying to the plaintiff Welker B. Brooks the sums set out in the award referred to and the said plaintiff has been accepting the same.

[fol. 10] 4. That under the award made as hereinbefore set out, which has been accepted by the plaintiff, the plaintiff is barred from further recovery from the defendant in this action, and the acceptance of said award is hereby pleaded in bar of recovery in this action.

Wherefore, the defendant prays the Court that this action be dismissed and for such other and further relief as the defendant may be entitled to.

David E. Henderson, United States Attorney, Attorney for defendant, The United States of America.

In United States District Court

Findings and Conclusions of Law (Welker B. Brooks Case)

This cause coming on for trial, and trial of the same having been completed, the Court upon all of the evidence and under the law applicable thereto makes the following findings and conclusions with respect to the matters which are here in controversy:

That upon arriving at the highway intersection which is involved in this case and before entering the same, Arthur L. Brooks, the driver of the automobile in which the plaintiff was riding, brought the said automobile to a full stop, and then, it reasonably appearing under all the circumstances that he could do so in safety, he drove the said automobile into the said intersection in a reasonably prudent manner and had passed approximately two-thirds of the distance through the said intersection when the said automobile was struck on its left side with great force by the defendant's truck, driven by the defendant's employee;

[fol. 11] That the defendant's truck entered the aforesaid intersection after the automobile in which the plaintiff was riding had already entered the same; that the driver of the defendant's truck, under the circumstances then and there existing as he drove into and traversed the intersection and until the said truck collided with the aforesaid automobile, was operating the said truck at an imprudent rate of speed and without sufficiently checking the speed of the said truck and without exercising sufficient care and caution in guiding and controlling the said truck, caused and permitted the same to strike the automobile in which the plaintiff was riding;

That the driver of the defendant's truck, moreover imprudently swerved the truck to his left as he drove into and traversed the aforesaid intersection, thereby causing the truck to collide with the aforesaid automobile, whereas, on the other hand, the driver of the said truck could have continued straight ahead or swerved in reasonable safety to his right, and thereby avoided the aforesaid collision.

That the personal injuries which the plaintiff sustained in the collision of the aforesaid truck and automobile were proximately caused by negligence on the part of the driver of the defendant's truck and not by negligence on the part of the plaintiff;

That the plaintiff is reasonably entitled to damages from the defendant in the amount of Four Thousand ($4,000.00) Dollars, on account of his said personal injuries.

Charles C. Cavanah, Judge Presiding over October 1947 Term of the United States District Court for the Western District of North Carolina at Charlotte.

[fol. 12] IN UNITED STATES DISTRICT COURT

JUDGMENT (WELKER B. BROOKS CASE)

This cause coming on for trial, and having been tried, and the Court having made findings and conclusions as appear of record in favor of the plaintiff;

Now, therefore, it is hereby ordered, adjudged and decreed that the plaintiff have and recover of the defendant

the sum of Four Thousand ($4,000.00) Dollars, together with the costs of this action.

This the 8th day of November 1947.

Charles C. Cavanah, Judge Presiding over October, 1947, Term of the United States District Court for the Western District of North Carolina at Charlotte.

IN UNITED STATES DISTRICT COURT

JUDGMENT ON MOTION TO DISMISS (WELKER B. BROOKS CASE)

This cause coming on to be heard and being heard before the undersigned District Judge, commissioned to hold a Special Term of Civil Court for the Western District of North Carolina, at Charlotte, during October and November 1947;

And it appearing to the Court that the defendant United States of America has filed a motion to dismiss in instant case on the grounds that the District Court lacked jurisdiction in suits brought under the Federal Tort Claims Act on claims of injury or death to a member of the military personnel;

And it further appearing to the Court that the instant case is a suit brought by a member of the military personnel for injuries received while in the line of duty and in the armed services of the United States;

[fol. 13] Therefore, the Court is of the opinion that the Federal Tort Claims Act does not cover suits of this nature, and that this suit should be dismissed for want of jurisdiction, and the Court having granted said motion;

It is, therefore, ordered, adjudged and decreed, that this action be, and it is hereby, dismissed, and the judgment entered on the 8th day of November 1947 is hereby set aside and declared void for the reason assigned in the defendant's motion.

The Clerk will enter this judgment.

This — day of January 1948.

The motion is denied. Exception allowed. January 7, 1948.

Charles C. Cavanah, United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION

JAMES M. BROOKS, Administrator of the Estate of ARTHUR L. BROOKS, Deceased, Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant

COMPLAINT

The plaintiff, complaining of the defendant, says and alleges:

1. That the plaintiff is a resident of Mecklenburg County, North Carolina, and is the duly appointed, qualified and acting administrator of the estate of Arthur L. Brooks, de- [fol. 14] ceased—the plaintiff having been appointed as such administrator by the Clerk of the Superior Court of Mecklenburg County, North Carolina, and having qualified as such administrator before the said Clerk of the Superior Court of Mecklenburg County, North Carolina.

2. That on or about February 17, 1945, the plaintiff's intestate, Arthur L. Brooks, who was a son of the plaintiff, was a member of the United States Military Forces and was located at Fort Bragg, North Carolina; that on the evening of said date the plaintiff's intestate, together with the plaintiff and another son of the plaintiff, Welker B. Brooks, were riding in a two-seated Chevrolet Sedan belonging to the plaintiff's intestate; that on said occasion the plaintiff's intestate was driving his said automobile, the plaintiff sitting in the front seat of said automobile beside his said son, the plaintiff's intestate, and the plaintiff's other son, Welker B. Brooks, sitting alone in the back seat of said automobile.

3. That at about eight o'clock P. M., after dark on the evening of the aforementioned date, the plaintiff and his said two sons were traveling in the aforesaid automobile on a payed highway from Fayetteville, North Carolina, to Fort Bragg, North Carolina; that while thus proceeding, they approached a point where said highway intersects another payed highway; that on said occasion it was the purpose of the occupants of said automobile to enter onto the said second highway and proceed thereon the remaining distance to Fort Bragg, but that in order to do so, it was first

necessary for them to cross over half of said second highway in order to get upon the farther lane thereof, on which traffic moved in the direction of Fort Bragg.

4. That upon arriving at the said second highway and before entering thereon, the plaintiff's intestate brought the [fol. 15] aforesaid automobile to a complete stop; that it appearing that no vehicle was approaching, the plaintiff's intestate started his said automobile across the nearer lane of the said highway in order to get upon the farther lane thereof, as hereinabove set forth; that his said automobile had almost cleared the said lane which it was crossing when suddenly it was struck on its left side with terrific force by a motor vehicle traveling, as the plaintiff is informed and believes, without any lights, at a very rapid, excessive and unlawful rate of speed; and that as a result of said motor vehicle striking the said Chevrolet automobile which the plaintiff's intestate was driving, he, the plaintiff's intestate, Arthur L. Brooks, was instantly killed, and his said automobile completely demolished.

5. That, as the plaintiff is informed and believes, the motor vehicle which struck the aforesaid Chevrolet automobile was a large motortruck belonging to the United States Army and operated for and in behalf of the United States Army through its authorities at the Military Post of Fort Bragg, North Carolina; that said motortruck, as the plaintiff is informed and believes, was being operated and driven on the occasion herein referred to by a civilian employee of the defendant, who, as the plaintiff is informed and believes, was operating and driving the said motortruck on the said occasion within the scope of his employment.

6. That the said employee of the defendant was operating and driving the said motortruck on the said occasion in a careless and negligent manner in that he was operating and driving the same at an excessive and unlawful rate of speed, in the dark without any lights thereon, without reasonable and proper attention and regard under the circumstances for the rights of persons in the position of the [fol. 16] plaintiff's intestate, without reasonable and proper warning under the circumstances to persons in the position of the plaintiff's intestate, and without reasonable and proper control of said motortruck, under all the then and

there existing circumstances; that such negligence on the part of the defendant's employee was the direct and proximate cause of the death of the plaintiff's intestate and the damage to the property of the plaintiff's intestate, hereinabove referred to.

7. That immediately before it was struck by the aforesaid motor truck, the reasonable market value of the aforesaid Chevrolet automobile belonging to the plaintiff's intestate was $450.00; that immediately after it was struck by the said motor truck, the reasonable market value of the aforesaid Chevrolet automobile was $25.00.

8. That by reason of the matters hereinabove set forth, that is, the aforesaid damage to the property of the plaintiff's intestate, and the death of the plaintiff's infestate, under the circumstances hereinabove set forth, and expenses necessarily incurred by the plaintiff as a result of the death of the plaintiff's intestate, the plaintiff, as administrator of the estate of the said Arthur L. Brooks, deceased, is entitled to recover of the defendant the sum of $50,425.00.

9. That the plaintiff is entitled to maintain this action against the defendant by virtue of the provisions of the "Federal Tort Claims Act," the same being Title IV of the Legislative Reorganization Act of 1946, enacted by the Congress of the United States.

Wherefore, the plaintiff prays that he have and recover judgment of the defendant in the sum of $50,425.00, together with the costs herein.

W. C. Blakeney, Guthrie, Pierce & Blakeney; Attorneys for the Plaintiff.

[fol. 17] IN UNITED STATES DISTRICT COURT

ANSWER (JAMES M. BROOKS, ADMINISTRATOR CASE)

The Defendant, answering the complaint of the plaintiff, says:

1. That Paragraph One of plaintiff's complaint is not denied.

2. In answering Paragraph Two of plaintiff's complaint, it is admitted that Arthur L. Brooks was the driver of said

automobile on February 17, 1945. Defendant does not have sufficient information as to the position of the other occupants of said automobile, and the remaining portion of said paragraph is therefore denied.

3. In answering Paragraph Three of plaintiff's complaint, defendant does not have sufficient information as to the truth of the matters alleged therein, and therefore denies same.

4. In answering Paragraph Four of plaintiff's complaint, defendant admits that plaintiff's automobile stopped before entering highway No. 87. The remaining allegations are untrue and therefore denied.

5. In answering Paragraph Five of plaintiff's complaint, it is admitted that the truck was the property of the defendant and was being operated by a civilian employee. The remaining portion of said paragraph is denied.

6. Paragraph Six of plaintiff's complaint is untrue and is therefore denied.

7. In answering Paragraph Seven of plaintiff's complaint, the defendant has no knowledge of the extent of plaintiff's injury, but expressly denies that defendant by any act on its part or on the part of its employee or driver in anywise caused or contributed to said injury.

[fol. 18] 8. Paragraph Eight of plaintiff's complaint is untrue and is therefore denied.

9. In answering Paragraph Nine of plaintiff's complaint, it is admitted that certain actions may be instituted under the Federal Tort Claims Act.

Further Defense

1. That the defendant was at no time guilty of negligence, carelessness, wrongful or unlawful conduct upon the occasion hereinabove mentioned as its vehicle was proceeding on highway No. 87 on the right-hand side of the road in a one-way traffic lane in a careful, cautious and prudent manner on a highway clear of traffic with the exception of plaintiff's automobile which had stopped at said intersection and was apparently waiting for defendant's vehicle to pass. That the injury sustained by plaintiff as a result of said collision arose solely and exclusively from and was proximately

caused and produced by the negligent, careless, reckless, wrongful, and unlawful acts and conduct of plaintiff.

2. That without waiving any of the foregoing defenses, but specifically relying upon same, the defendant avers that even if it was guilty of negligence, wrongful, or unlawful conduct upon the occasion of said accident, all of which is expressly denied, the negligent, wrongful, and unlawful acts and conduct of the plaintiff was:

(a) That the vehicle in which plaintiff was driving after making a complete stop at a stop signal posted at the intersection of the Old Fort Bragg road as it entered highway No. 87 failed to observe the condition of traffic passing over highway No. 87 which was then and is now an arterial highway, and without warning, the driver of said vehicle [fol. 19] suddenly moved said vehicle from a completely stopped position directly into the path of defendant's vehicle causing said vehicle to crash into the automobile which plaintiff was driving.

(b) The vehicle in which plaintiff was driving was being operated in such a manner and in a wilful and wanton disregard of the rights and safety of others and without due caution and circumspection and in a manner so as to endanger or likely to endanger persons or property upon said highway.

That said acts constituted contributory negligence upon the part of the plaintiff and that said wrongful, negligent, and unlawful acts and conduct are hereby expressly pleaded as contributory negligence and a bar to any recovery by the plaintiff herein.

Wherefore, having fully answered the complaint of the plaintiff, the defendant prays:

1. That the plaintiff have and recover nothing of the defendant in this action, and that said action be dismissed.

2. That the plaintiff be taxed with the costs and have such other and further relief as the defendant may be lawfully entitled.

David E. Tenderson, United States Attorney. W. Nicholson, Assistant United States Attorney.

In United States District Court

Further Answer and Defense (James M. Brooks, Administrator Case)

After leave of the Court first had and obtained, the defendant, the United States of America, files this amended answer and further defense.

[fol. 20] 1. At the time of the death of Arthur L. Brooks, he was in the military service of the United States of America located at Fort Bragg, N. C.

2. That the defendant has paid to Maggie H. Brooks, decedent's mother, the sum of $468.00, being the payment of the 6 months' gratuity pay as provided for in cases of the death of persons in military service in like cases, which sum has been accepted.

3. That if the plaintiff should recover anything in this action, the defendant alleges that the $468.00 paid should be considered in diminution of any damages in this action.

4. That the defendant denies that the defendant (plaintiff) is entitled to recover anything in this action, and that the United States of America is not indebted in any sum.

Wherefore, the defendant prays judgment that this action be dismissed, but if the plaintiff should recover any damages, that the sum of $468.00 should be credited in diminution of such damages, and for such other and further relief as the defendant may be entitled to.

David E. Henderson, United States Attorney, Attorney for defendant, United States of America.

In United States District Court

Findings and Conclusions of Law (James M. Brooks, Administrator, Case)

This cause coming on for trial and trial of the same having been completed, the Court upon all of the evidence, and under the law applicable thereto makes the following findings and conclusions with respect to the matters which are here in controversy.

[fol. 21] That upon arriving at the highway intersection which is involved in this case and before entering the same, the plaintiff's intestate, Arthur L. Brooks, brought the automobile which he was driving to a full stop, and then, it reasonably appearing under all the circumstances that he could do so in safety, he drove the said automobile into the said intersection in a reasonably prudent manner and had passed approximately two-thirds of the distance through the said intersection when the said automobile was struck on its left side with great force by the defendant's truck, driven by the defendant's employee;

That the defendant's truck entered the aforesaid intersection after the automobile of the plaintiff's intestate had already entered the same; that the driver of the defendant's truck, under the circumstances then and there existing as he drove into and traversed the intersection and until the said truck collided with the aforesaid automobile, was operating the said truck at an imprudent rate of speed and without sufficiently checking the speed of the said truck and without exercising sufficient care and caution in guiding and controlling the said truck, caused and permitted the same to strike the automobile of the plaintiff's intestate;

That the driver of the defendant's truck, moreover, imprudently swerved the truck to his left as he drove into and traversed the aforesaid intersection, thereby causing the truck to collide with the aforesaid automobile, whereas, on the other hand, the driver of the said truck could have continued straight ahead or swerved in reasonable safety to his right and thereby have avoided the aforesaid collision;

That the death of the plaintiff's intestate was thus proximately caused by the negligence on the part of the driver of the defendant's truck and not by negligence or contributory-
[fol. 22] negligence on the part of the plaintiff's intestate.

That the plaintiff is reasonably entitled to damages from the defendant in the amount of Twenty-Five Thousand ($25,000.00) Dollars for the wrongful death of the plaintiff's intestate, and in the amount of Four Hundred Twenty-Five ($425.00) Dollars for damage to the plaintiff's automobile.

Charles C. Cavanah, Judge Presiding over October 1947 Term of the United States District Court for the Western District of North Carolina at Charlotte.

IN UNITED STATES DISTRICT COURT

JUDGMENT (JAMES M. BROOKS, ADMINISTRATOR, CASE)

This cause coming on for trial and having been tried, and the Court having made findings and conclusions as appear of record in favor of the plaintiff;

Now, therefore, it is hereby ordered, adjudged and decreed that the plaintiff have and recover of the defendant the sum of Twenty-Five Thousand Four Hundred Twenty-five ($25,425.00) Dollars, together with the costs of this action.

This the 8th day of November 1947.

Charles C. Cavanah, Judge Presiding over October 1947 Term of the United States District Court for the Western District of North Carolina at Charlotte.

[fol. 23] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS (JAMES M. BROOKS, ADMINISTRATOR, CASE)[18]—Filed November 18, 1947

Comes now the United States of America, defendant in the above-entitled action, through its attorney David E. Henderson, United States Attorney for the Western District of North Carolina, and moves the Court as follows:

1. To set aside the judgment signed and entered in the above entitled action on November 8, 1947 at Charlotte, North Carolina, and to dismiss said suit for the reason that the Court lacks jurisdiction in suits of this nature brought under the Federal Tort Claims Act on claims of injury or death to a member of the military personnel.

David E. Henderson, United States Attorney, Attorney for Defendant.

NOTICE OF MOTION

To Whiteford S. Blakeney, Attorney for Plaintiff James M. Brooks, Administrator of the Estate of Arthur L. Brooks, deceased:

Please take notice that the undersigned will bring the above motion on for hearing before Honorable Charles C.

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[18] An identical Motion To Dismiss was filed on November 18, 1947 in the *Welker B. Brooks* case.

Cavanah at the courtroom of the United States District Court in the Post Office Building, Raleigh, North Carolina, [fol. 24] on the 25th day of November, 1947, at 10 o'clock A. M., or as soon thereafter as counsel can be heard.

David E. Henderson, United States Attorney, Attorney for Defendant, 252 Post Office Building, Charlotte, North Carolina.

[fol. 25] IN UNITED STATES DISTRICT COURT

JUDGMENT ON MOTION TO DISMISS (JAMES M. BROOKS, ADMINISTRATOR, CASE)

This cause coming on to be heard and being heard before the undersigned District Judge, commissioned to hold a Special Term of Civil Court for the Western District of North Carolina, at Charlotte, during October and November 1947;

And it appearing to the Court that the defendant United States of America has filed a motion to dismiss in instant case on the grounds that the District Court lacked jurisdiction in suits brought under the Federal Tort Claims Act on claims of injury or death to a member of the military personnel;

And it further appearing to the Court that instant case was brought by the Administrator of the Estate of a deceased soldier for damages due to death of the soldier, a member of the military personnel;

Therefore, the Court is of the opinion that the Federal Tort Claims Act does not cover suits of this nature, and that this suit should be dismissed for want of jurisdiction, and the Court having granted said motion;

It is, therefore, ordered, adjudged and decreed that this action be, and it is hereby dismissed and the judgment entered on the 8th day of November, 1947, is hereby set aside and declared void for the reason assigned in the defendant's motion.

The Clerk will enter this Judgment.

This — day of January 1948.

Charles C. Cavanah, U. S. District Judge.

The Motion is denied, exception allowed. Jan. 7th, 1948.

(S.) Charles C. Cavanah, United States District Judge.

[fol. 26] IN UNITED STATES DISTRICT COURT

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

Testimony of WELKER B. BROOKS

* * * * * * * *

Q. When did you come to?

A. Well, I don't know exactly how long I was knocked unconscious, but it was in the hospital.

Q. Where?

A. Fort Bragg.

Q. How long did you stay there in the hospital, Mr. Brooks?

A. From February 17th to May 7th.

Q. What treatment did they give you there?

A. They re-set my jaw, my cheekbone.

Mr. Henderson: I'd like to preserve our objections and exceptions on the Motion we have made, at the conclusion, of the evidence, that whatever his condition was has been taken care of.

The Court: We will take this testimony and then hear you on it.

Q. What did they do to you there in the hospital?

A. They re-set my cheekbone that was shattered and gave me thirty days' check.

Q. After thirty days they did what?

A. Took a blood clot out of my ear.

Q. Where were you injured, what part of your body?

A. My left cheekbone, my head.

Q. To what extent was it injured?

A. It was shattered up.

Q. The upper jaw bone or lower?

A. Upper.

Q. And the left cheekbone?

A. Yes, sir.

Q. Did they operate on you?

A. Yes, sir.

Q. Who did that?

A. Major Shoemaker and Captain Winegass.

[fol. 27] Q. When they let you out of Fort Bragg hospital, where did you go?

A. Back to duty in California.

. . . . . .

Cross examination.

By Mr. Henderson:

Q. Mr. Brooks, when were you discharged from military service.

A. December 14, 1945.

Q. And when did you make application to the Veterans' Administration for compensation?

A. I believe it was either January or February.

Q. Of what year?

A. 1946.

Q. That application was made for compensation because of injuries that you claim to have received on February 17, 1945?

A. Yes, sir.

Q. And you had a hearing before the Veterans' Administration?

A. Yes, sir.

Q. And you were examined by their doctors?

A. Yes.

Q. And award was made as compensation in which—they first made an award of $20.00 per month?

A. $23.00 I believe it was.

Q. And the government paid you $23.00 a month for a short period of time?

A. Yes, sir.

Q. And then, under the regulations, you were entitled to an increase in that amount and so they allowed you then $26.70 a month?

A. $27.60 a month.

Q. How long have you been drawing that $27.60 a month?

A. I believe it was along about May.

[fol. 28] Q. May, 1946?

A. Yes.

Q. So you have drawn the $27.60 since that time.

A. Yes, sir.

Q. And you are drawing that every month now?

A. Yes, sir.

Q. Of course, you understand that if your condition gets better, it gets less, and if your condition gets worse from that accident that you had, you get more?

A. Yes, sir.

Q. Was any other compensation paid you beside what is being paid by the Veterans' Administration?

A. No, sir.

Q. The Government took care of all the doctor bills?

A. Yes.

Q. And the hospital bill?

A. Yes.

. . . . . .

Testimony of R. G. Byers

. . . . . .

Q. Where were you living and what were you doing about February 17, 1945?

A. I was living at Fort Bragg, North Carolina, and on February 19, 1945, I was appointed to investigate the circumstances under which Staff Sergeant Arthur L. Brooks met his death.

. . . . . .

Q. Are you acquainted with the payment of this gratuity pay, six months' gratuity pay?

A. Well, I know that if a soldier dies or is killed in line of duty in the service that six months' gratuity pay is given to the beneficiary.

Q. Is that a part of the extended salary pay?

[fol. 29] A. Yes, that is a payment of six months' further monthly salary, what it will amount to.

Q. That is what the government paid in this case?

A. Yes, that was the purpose of my investigation—to determine whether or not this soldier was killed in the line of duty or whether or not that benefit would be paid, depending upon the result of my investigation.

. . . . . .

In United States District Court

No. 547

James M. Brooks, Administrator of the Estate of Arthur L. Brooks, Deceased, Plaintiff,

v.

The United States of America, Defendant

No. 545

Welker B. Brooks, Plaintiff,

v.

The United States of America, Defendant

No. 546

James M. Brooks, Plaintiff,

v.

The United States of America, Defendant

Opinion

Cavanah, District Judge:

These cases were consolidated and tried together as they all arise out of the same alleged accident involving a collision of a Chevrolet automobile belonging to and driven by Arthur L. Brooks, now deceased, and an Army [fol. 30] truck, belonging to the United States and driven by a civilian employee of the United States about the hour of eight o'clock P. M. at the intersection of highway No. 87 and the old Fort Bragg road in North Carolina.

The principal issue of fact is one of negligence as to whether the defendant was negligent in the operation of the Army truck at the time of the accident and was the proximate cause of the injuries and damages to the plaintiffs, or whether the collision was caused by the negligence of the plaintiffs.

It appears that Arthur L. Brooks who was in the military service of the United States and was driving the Chevrolet automobile, was instantly killed and his automobile demolished. Riding with him in his automobile

were his father and Welker B. Brooks, a brother, who received the injuries complained of. It was dark and the weather rainy, and the plaintiff James L. Brooks and his two sons were traveling on a paved highway from Fayetteville to Fort Bragg, North Carolina, and while thus proceeding they approached a point where the two highways intersect and before entering upon highway No. 87 Arthur L. Brooks brought his automobile at a complete stop and it not appearing to him or the other two occupants then in his automobile that a vehicle was approaching, he started his automobile across the nearer lane of the highway in order to get upon the farther lane and before he cleared the lane upon which he was traveling his automobile was suddenly struck with force on its left side by the Army truck then driven by the civilian employee of the defendant and knocked upon the grass space in the center of the highway. To determine this issue of fact of negligence it becomes first necessary to consider the pertinent provisions of the North Carolina Motor Vehicle Laws requiring of one operating a vehicle upon [fol. 31] a highway to decrease the speed of his automobile lower than the limits allowed when in approaching an intersection of highways as may be necessary to avoid colliding with any vehicle or person on or entering the highway and may not drive at a speed that is not necessary, reasonable, and prudent under the circumstances, notwithstanding the speed is less than that fixed, and must use due care at all times, sec. 20-141 of laws of North Carolina; *Kolman* v. *Silbert*, 119 N. C. 134, and when two vehicles approach or enter an intersection at approximately or at the same time the driver of the vehicle on the left shall yield the right of way to the driver on the right, sec. 20-155.

The physical facts of the situation near and at the intersection of the highways and the oral testimony of the witnesses present a clear picture of the positions of the parties immediately before and at the time of the collision, as it appears that the plaintiffs were operating the Chevrolet automobile with lights on and brought it to a complete stop at or near the point where a stop sign was at before entering upon the intersection and that the operator of the Army truck could have observed it at a reasonable distance from the intersection and before the plaintiffs' automobile entered upon the intersection. His vision to the right was not obstructed, as the country was flat. The inter-

section was of sufficient length and width for both plaintiffs' automobile and the Army truck to have cleared one another if operated in a proper manner, with caution, reasonable speed, and lookout. The plaintiffs' automobile was about two-thirds in the intersection when it was struck, and if the Army truck was either stopped or traveling at a reasonable speed from the time the operator first saw it until the collision, ample opportunity was given to him to have [fol. 32] avoided the collision by reducing the speed he was going so he could have had his truck under immediate control when he had arrived at the intersection, but did not do so, and recklessly entered the intersection when it was dark and raining. The Army truck swayed to the left on the intersection when it struck plaintiffs' automobile, striking it with great force, instead of swaying to the right or continuing in a straight line avoiding the collision, as it did not have the right of way and took the last clear chance when doing so. It did not enter the intersection carefully or act prudently, thereby violating the laws of North Carolina which under all of the evidence constituted negligence on its part entitling the plaintiffs to a recovery.

The contention asserted by the defendant in the case of Welker B. Brooks that he is and has been receiving monthly compensation from the Veterans' Administration since the accident is a bar in this action, as he has adopted that course and his sole remedy for further compensation is before that board and cannot adopt two courses, otherwise he would be receiving from the Government double compensation for his injuries, pain, suffering, and medical expenses paid by the Government.

Approaching this question, we are confronted first, with two Federal Acts which apply to the present action, Title 28, U. S. C. A. sec. 931, and Title 38, U. S. C. A., sec. 471 et seq., one relating to liability of the United States and one relating to receiving disability payments from the United States Veterans' Administration. There is not as yet any specific authority on the question. The inquiry is then ought the plaintiff be entirely barred from suit for damages by disability payments which do not include all of the elements of damages which are involved in the suit? The [fol. 33] present action includes account of plaintiffs' injuries which are not included in the disability payments which he is now receiving. Should the Veterans' Administration cease to make payments to the plaintiff he could not

then have recourse to his present action for damages because the same would be barred by the statute of limitations expressed in the Federal Tort Claims Act. There does not appear any provision in the Federal Act allowing disability payments making them exclusive as is the Workmen's Compensation statute of North Carolina. The thought is expressed in the case of *Standard Oil Co.* v. *United States*, 153 Federal 2d 958, seems to be somewhat analogous, where it was held that a soldier who is tortiously injured and receiving medical care and hospitalization from the United States Government and at the same time collect damages from a third party tort-feasor, there is no subrogation on the part of the government to the soldier's rights against the third party tort-feasor. As the Federal Tort Claims Act makes the government just as liable as a private tort-feasor would be, it would follow that the government may make veterans' payments to the plaintiff and at the same time be liable to him as a tort-feasor.

It will be observed that the language contained in section 931 of the Federal Tort Claims Act stating that the United States shall be liable under like circumstances and in the same manner and extent as a private individual, means the manner and extent of the accident, and does not refer to questions of receiving disability payments.

Reasoning then that the Federal Acts apply and control, the thought urged by the defendant that the state Workmen's Compensation statute and decisions cited controls would not be analogous, for after all if the action is gov- [fols. 34-38] erned by a Federal Act, a statute or decision rendered before the enactment of the Federal Acts would not apply or control.

The further contention of defendant that the six months salary of the deceased Brooks paid to his mother should be deducted from the amount allowed to his estate, is not tenable under the Federal Regulations, for that is a definite and separate amount allowed by the regulations.

So, from the conclusion thus reached the amounts of damages to be allowed in the three actions against the defendants are:

First—That in case of James M. Brooks, Administrator of the estate of Arthur L. Brooks, deceased, the deceased being a young man at the time of the accident of the age of thirty-two with a life expectancy of a large number of years,

the court finds that the sum of $25,000 is a reasonable amount as damages to be allowed his estate, and the further sum of $425.00 as damages the value of his automobile which was demolished.

Second—That in the case of James M. Brooks, he having received an injury to his left hand and other slight injuries, the sum of $5,000.00 is a reasonable amount as damages to be allowed to him.

Third—That in the case of Welker B. Brooks, for an injury to his face and head, which do not appear to be permanent, although he has suffered pain and suffering, the sum of $4,000.00 is a reasonable amount to be allowed to him.

In each of the cases the plaintiffs are entitled to their costs.

Findings and decree will be prepared by counsel for the plaintiffs and presented to the Court.

[fol. 39] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5758

UNITED STATES OF AMERICA, Appellant,

versus

WELKER B. BROOKS, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina, at Charlotte

May 25, 1948, the transcript of record is filed and the cause docketed.

May 27, 1948, two orders extending the time to and including May 28, 1948, for filing record on appeal and docketing action are filed.

May 28, 1948, the appearance of W. S. Blakeney is entered for the appellee.

June 1, 1948, the appearance of David E. Henderson, United States Attorney, is entered for the appellant.

June 8, 1948, brief and appendix on behalf of the appellant are filed.

June 15, 1948, the appearance of Paul A. Sweeney is entered for the appellant.

June 24, 1948, consent of appellant to extension of time to file appellee's brief is filed.

July 1, 1948, brief on behalf of the appellee is [fol. 40] filed.

ARGUMENT OF CAUSE

July 5, 1948, (June term, 1948) cause came on to be heard, together with No. 5759, before Parker and Dobie, Circuit Judges, and Watkins, District Judge, and was argued by counsel and submitted.

[fol. 41] Opinion— Filed August 26, 1948

United States Circuit Court of Appeals, Fourth Circuit

No. 5758

United States of America, Appellant,

versus

Welker B. Brooks, Appellee

No. 5759

United States of America, Appellant,

versus

James M. Brooks, Administrator of the Estate of Arthur L. Brooks, Deceased, Appellee

Appeals from the District Court of the United States for the Western District of North Carolina, at Charlotte

[fol. 42] (Argued July 5, 1948. Decided August 26, 1948)

Before Parker and Dobie, Circuit Judges, and Watkins, District Judge

Paul A. Sweeney, Attorney, Department of Justice, (Newell A. Clapp, Acting Assistant Attorney General; David E. Henderson, U. S. Attorney, and Morton Hollander, Attorney, Department of Justice, on brief) for Appellant; and Whiteford S. Blakeney (Guthrie, Pierce & Blakeney on brief) for Appellees.

Dobie, Circuit Judge:

Welker Brooks and James Brooks, as Administrator of the Estate of Arthur Brooks, deceased, filed civil actions in the United States District Court for the Western District of North Carolina, against the United States under the Federal Tort Claims Act, 28 U.S.C.A. § 921 et seq. The District Judge, sitting without a jury, entered judgments against the United States in favor of Welker Brooks and James Brooks, Administrator of the Estate of Arthur Brooks. The case is before us on the appeal of the United States from these judgments.

About 8 P. M. on February 17, 1945, Welker Brooks and Arthur Brooks, both enlisted men in the United States Army, were driving with their father, a civilian, in their private automobile on a public highway near Fayetteville, [fol. 43] North Carolina. Both soldiers were on leave or furlough, engaged in their private concerns and not on any business connected with their military service. The Brooks automobile collided with an Army truck, operated by a civilian employee of the War Department, which was transporting the members of a Fort Bragg band to Fayetteville. Arthur Brooks was killed and Welker Brooks was seriously injured as a result of the collision, which the District Judge held to be due to the negligence of the driver of the Army truck.

The only question we are called upon to decide is whether Welker Brooks and James Brooks, as Administrator of the Estate of Arthur Brooks, deceased, have claims against the United States under the provisions of the Federal Tort Claims Act. We think the District Judge erred by answering this question in the affirmative.

This problem of statutory interpretation is close and difficult, due primarily to the inept draftsmanship on the part of Congress in failing to make clear and express provision as to soldiers in the United States Army.

It seems crystal clear that the claims here in suit fall literally within the comprehensive words "any claim against the United States, for money only" used in §410(a) of the Act, without any specific limitation as to the classes of persons who have valid claims under the Act. This fact, however, is not in itself determinative of our problem. The proper approach, we think, was admirably stated by District Judge Chesnut, in *Jefferson* v. *United States*, 77 F. Supp. 706, 711-712.

> "It is a familiar rule of statutory construction that the merely literal reading of particular words in an Act [fol. 44] can be narrowed by construction where, from the whole subject matter of the particular Act and its setting in the whole governmental scheme, the court can see that the literal import of the phrase used is contrary to established policy and would not accord with the real intention of Congress in passing the Act, and for this purpose we may look to the reason of the enactment and inquire into its antecedent history and give

> it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.' *Takao Ozawa* v. *United States*, 260 U. S. 178, 43 S. Ct. 65, 67, 67 L. Ed. 199; *United States* v. *Sweet*, 245 U. S. 563, 38 S. Ct. 193, 62 L. Ed. 473; *United States* v. *Arizona*, 295 U. S. 174, 55 S. Ct. 666, 79 L. Ed. 1371."

Manifestly, the purpose of any important enactment of Congress is entitled to very great weight in determining the scope of the enactment. *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561. The purpose of the Legislative Reorganization Act of 1946, of which the Federal Tort Claims Act is Title IV, is said to be: "To provide for the increased efficiency in the legislative branch of the Government." Congress, for many years, had been plagued with a veritable flood of private bills authorizing the payment of money for personal injuries or property damage caused by the tortious conduct of employees of the United States. These bills consumed an appreciable portion of Congressional time and energy. And Congress, by its size and organization, was ill fitted to pass fairly upon these bills. §131 of the Legislative Reorganization Act of 1946 specifically forbids the introduction of such private bills for claims falling within the ambit of the Act.

While private bills for the relief of *civilians* were indeed [fol. 45] legion, exceedingly rare and very far between were such bills for the relief of men in the armed services. In this connection, we may note the following explanatory statement at page 31, Report No. 1400, on S. 2177 (79th Cong., 2d sess.), which became the Legislative Reorganization Act of 1946:

> "With the expansion of governmental activities in recent years, it becomes especially important to grant to *private* individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles." (Italics ours.)

The soldier, upon enlistment, acquires a special and unique military status, quite different from any relation between the Federal Government and civilians. *United States* v. *Standard Oil Co. of California*, 332 U. S. 301, 305; *In re Morrissey*, 137 U. S. 157, 159; *in re Grimley*, 137 U. S. 147. The soldier is subject to military discipline even while

at play, and his desertion is a serious crime, punishable at times by death. Rarely, if ever, is a soldier referred to by Congress as a "private individual."

Congress has established a complete and comprehensive administrative system of compensation to take care of the death of, or injuries to, servicemen. Monthly pension payments for disabling injuries, pensions to the widow, children or dependent parents for the death of a serviceman, full pay during periods of incapacity, medical attention and hospitalization, life insurance at rates far below the rates of commercial companies, employment preferences, education—all these and many other benefits, are distinctly given to servicemen. Nor have the States been niggardly to veterans. Certainly there is force in the suggestion that Congress [fol. 46] thought this system of benefits took adequate care of soldiers and intended thereby to exclude soldiers from the right to sue the United States for personal injuries received in the service.

In various statutes by which Congress has established this complete and comprehensive administrative system of compensation for damages resulting from the injury or death of a soldier, it has made no distinction between injuries received while a soldier was on furlough or leave, and injuries received while a soldier was on active duty. If the injury or disease is incurred during the period of his military service, it is service-connected, and is compensible, even though not service-caused. The fact that payments were made by the United States on account of the death of Arthur L. Brooks and the injuries of his brother Welker, shows the practice where the soldier is on leave.

In cognate Congressional statutes, wherein the United States has waived its traditional immunity from suit for tort claims, these statutes have been judicially interpreted as inapplicable to members of the armed services. Thus, the Public Vessels Act (46 U. S. C. A. §781 et seq.) authorized: "a libel in personam * * * against the United States * * * for damages caused by a public vessel of the United States * * *." Yet it was held that there was no claim against the United States for the death of naval officers. Speaking for a unanimous Court, Circuit Judge Swan, in *Dobson* v. *United States*, 27 F. (2d) 807, 808-809, cert. den. 278 U. S. 653, used this trenchant language:

"Verbally, there is nothing which excludes liability for damage to property or person of officers or crew * * *.

"Nevertheless, the construction contended for by [fol. 47] appellants involves so radical a departure from the government's long-standing policy with respect to the personnel of its naval forces that we cannot believe the Act should be given such a meaning. The statute itself does not specify who may maintain suits under it. To allow suit by the officers and crew of the public vessel for damage caused by it to them would be too great a reversal of policy to be enacted by such general terms. The Act of October 6, 1917 (40 Stat. 389) and 34 U. S. C. A. Sections 981, 982 directs the Paymaster General of the Navy to reimburse officers, enlisted men, and others in the naval service who suffer loss or destruction of or damage to their personal property in the naval service. * * *.

"Chapter 3, Title 38, United States Code (38 U. S. C. A. Sections 151-206), provides an elaborate pension system for personal injury and loss of life incurred by officers and enlisted men in the Navy. These pensions may be thought an inadequate substitute for the recovery of full damages under the Public Vessels Act of March 3, 1925, but they were well-known to all who entered the naval service. * * * If it had been the purpose to change that policy as respects officers and seamen of the Navy injured by the unseaworthiness of a public vessel, or by the fault of one another, because that is what in the end it comes to, we cannot think it would have been left to such general language as is to be found in the above quoted Section 1 * * *.

"We believe that Congress meant to leave upon the members of the naval forces the same risks of injuries suffered in the service of the United States as they had before."

In *Bradey* v. *United States*, 151 F. (2d) 742, 743, cert. den. 326 U. S. 795, rehearing denied 328 U. S. 880, Circuit Judge [fol. 48] Learned Hand stated:

"'It is quite true that nothing in the test of the Public Vessels Act bars suit by a member of the armed forces, but in *Dobson* v. *United States*, 2 Cir., 27 F. (2d) 807, cert. den. 278 U. S. 653, 49 S. Ct. 179, 73 L. Ed. 563, we

held that, because of the compensation elsewhere provided for such persons, they must be deemed excluded from its protection. That case directly rules here; and to succeed, the libellant must prevail upon us to overrule it. This she attempts to do on the ground that the course of judicial decision since then discloses a change of attitude towards such sufferers.

"We can find no evidence of such a change, nor do we see any antecedent reason to think that we were wrong before."

See, also, The West Point, 71 F. Supp. 206, 212.

In like manner, under the Railroad Control Act of 1918 (40 Stat. 451), when the Federal Government controlled the railroads, it was held that a soldier injured by the negligent operation of a railroad had no valid action against the United States. *Sandoval* v. *Davis*, 288 Fed. 56. See, also, *Dahn* v. *Davis*, 258 U. S. 421, 428.

Appellees make much of the fact that the Act contains certain specific exceptions to the liability of the United States. From this it is argued that these expressed exceptions negative any other implied exceptions. *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 377; *Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100 218; *Lapina* v. *Williams*, 232 U. S. 78, 92. The maxim *expressio unius est exclusio alterius* is by no means a rule of statutory interpretation to be universally applied. Special stress is laid by appellees [fol. 49] on two of these express exceptions spelled out in the Act. Section 421(j) of the Act excepts: "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." See *Skeels* v. *United States*, 72 F. Supp. 372. Section 421(k) excepts claims "arising in a foreign country." This argument of appellees would have greater force if these two exceptions were set out in terms of *claimants*. But such is not the case. The first exception is couched solely in terms of the nature of the activity giving rise to the claim (combatant activities in war time) regardless of the claimant. And the second exception is stated purely in terms of place (whoever may make the claim), the *locus delicti*,—"a foreign country."

This contention of appellees with respect to the exceptions in question, if sound, would lead to rather fanciful

results. Thus, under the first exception, a soldier killed or injured in the important and perilous combat activities of war would be denied a recovery; while there would be a perfect claim for the soldier killed or injured in non-combat activities. Under the second exception, for a soldier injured or killed while stationed in Canada, no recovery; for a soldier injured or killed at Plattsburg, New York, just a few miles from the Canadian border, again a recovery. It is difficult for us to think that Congress intended such results to flow from the Federal Tort Claims Act.

Judicial authority on the precise problem before us is very scant. As far as we know, no federal appellate court has decided this question. In *Troyer* v. *United States* (Civil Action No. 4723), the action against the United States was dismissed by the United States District Court for the Western District of Missouri. The leading case seems to be *Jefferson* v. *United States*, decided by District [fol. 50] Judge Chesnut in the United States District Court for the District of Maryland. When this case first came before him, 74 F. Supp. 209, Judge Chesnut denied without prejudice the motion to dismiss; but when the case was before him for final disposition, 77 F. Supp. 706, the complaint was dismissed. See Hulen (U. S. District Judge), Suits on Tort Claims against the United States, 7 Fed. Rules Decisions 689, 694-695.

There was a clear factual distinction between the Jefferson case and the case before us. There the injury was service-caused since the claim was based on the negligence of an army surgeon while performing a surgical operation on the soldier. With us, the injuries were service-connected though not service-caused; for, at the time of the accident, appellees were on furlough or leave, riding in their privately owned automobile. Counsel for appellees, relying heavily on this factual distinction between the two cases, contend that the Jefferson decision does not control the instant case.

We readily admit the added and greater reason for denying recovery where the injury is service-caused (the Jefferson case) than where the injury is not service-caused (the present case). It is easy to conjure up the unfortunate results, including the subversion of military discipline, if soldiers could sue the United States for injuries incurred by reason of their being in the armed service of their country. If soldiers could sue for such injuries as illness based

on the alleged negligence of the company cook or mess sergeant, or if soldiers who contract sickness on wintry sentry duty had a right of action against the Government on the allegation of a negligent order given by the company commander, then the traditional grousing of the American soldier would result in the devastation of military discipline and morale.

[fol. 51] However, as we read his opinion, the cogent and powerful reasoning of Judge Chesnut is applicable to soldiers regardless of whether or not the injury is service-caused. And the Federal Tort Claims Act, as we interpret it, either excludes (subject, of course, to the express exceptions) soldiers altogether or completely includes them. We are quite unable to find in the Act anything which would justify us in holding that Congress intended to include death of, or injury to, a soldier, which was not service-caused (the instant case) and to exclude service-caused injury or death (the Jefferson case).

Our attention is called to the fact that in an early draft of the Federal Tort Claims Act (H. R. 181, introduced by Mr. Celler) there was an express exception with reference to soldiers, and the Act was finally enacted without this exception. The argument is made that when Congress, with this exception brought to its attention, deliberately omitted this exception from the final draft of the Act, it must fairly be inferred that Congress clearly intended to include soldiers within the scope of the Act.

This omitted exception (H. R. 181, section 402(8)) reads as follows:

> "Any claim for which compensation is provided by the Federal Employees' Compensation Act, as amended, or *by the World War Veterans' Act of 1924.*" (Italics ours.)

Thus a careful reading of this section shows that it did not exclude soldiers as a class from the benefits of the Act. It merely excepted (in addition to claims under the Federal Employees' Compensation Act) "Any claim for which compensation is provided * * * by the World War Veterans' Act of 1924,"—that is, merely and solely claims com-[fol. 52] pensable under a single Act of Congress, the World War Veterans' Act of 1924.

It is certainly arguable that Congress, when this exception was finally considered and rejected, must have been

familiar with the *Dodson* and *Bradey* cases. If so, and Congress did intend to include soldiers within the scope of the Act, every dictate of common sense would seem to require that Congress would manifest this intention not by inference or implication but, on so important a matter, by emphatic positive expression to that effect, in words so clear that they could readily be understood, even by federal judges. So radical a departure from previous policy and thought should certainly have been expressly stated and not left to inference. It might well have been, too, that Congress, aware of the considerations advanced in this opinion thought (as we do) that the Act, in its final form, did not apply to soldiers.

Judge Chesnut, in his opinion in the *Jefferson* case, 77 F. Supp. at page 712, stated:

> "The problem here is made more difficult by reason of the fact, as noted in the previous opinion in this case, that section 421 of the Act, 28 U. S. C. A. § 943, contains numerous types of claims which are excepted from the coverage of the Act, none of which, however, include the instant situation, *although in a prior proposed Act for the same general purpose, there was included such an exception.* Nevertheless, as previously stated, I reach the conclusion that the implied exception does exist in this case." (Italics ours.)

Again, at 77 F. Supp. page 713, Judge Chesnut, in referring to "Senate Report No. 1400, and also in the House Committee Report of July 22, 1946" said:

> [fol. 53] "And again in commenting on the stated exceptions to the Act appearing in section 421, it was said that the exceptions include 'claims which relate to certain governmental activities which should be free from threat of damage suits, or for which adequate remedies are already available.'"

And we quote another statement from his opinion, 77 F. Supp. at page 714:

> "The case strongly emphasizes the particular nature of government-soldier relationship and this furnishes strong support for the view that it was not the intention of Congress in passing the Tort Claims Act to include in the phrase 'any claim' those by former soldiers for

service-connected disabilities for which there was already existing a large body of federal legislation.

"Again it may be noted that section 410(a) also provides with respect to the test of liability as follows: 'Subject to the provisions of this title, the United States shall be liable in respect of such claims, to the same claimants, in the same manner, and to the same extent, as a private individual under like circumstances.'

"This phraseology is seemingly inapt if it had been the intention of Congress to give soldiers additional redress for service-connected disabilities. It is hardly conceivable to analogize the liability of the United States to that of a private individual in respect to service-connected disabilities in view of the government-soldier particular relationship."

For the reasons advanced in this opinion, we think the Federal Tort Claims Act does not apply to claims by soldiers in the United States Army, even when those claims arise out of injuries or death which, as here, are not [fol. 54] service-caused. Both of the judgments in favor of the plaintiffs-appellees in the District Court must, therefore, be reversed.

Reversed.

[fol. 55] PARKER, Circuit Judge, Dissenting:

These are appeals by the United States from judgments in favor of claimants under the Federal Tort Claims Act of August 2, 1946, 60 Stat. 842, 28 USCA 921. Plaintiffs were a soldier and the administrator of a deceased soldier of the United States Army. The claims were for damages on account of injuries received by the soldier and for the death of the deceased soldier resulting from the negligence of a civilian employee of the United States in the operation of an army truck. The two soldiers were on furlough and were riding with their father, a civilian, in a private automobile on a public highway and were not engaged in any business connected with their army service. The trial court found that the collision which resulted in the injury of one of the soldiers and the death of the other was due solely to the negligence of the civilian employee of the United States who was operating the army truck which ran into the automobile in which they were riding. Judgments were entered in favor of the soldier plaintiff for $4,000 damages

on account of personal injury and in favor of the administrator of the deceased soldier for $25,000 on account of wrongful death and $425 property damage.

The father of the two soldiers was injured as a result of the same collision and he was awarded $5,000 damages; but no appeal was taken from that judgment and no question is raised on the appeals before us as to the finding of the District Judge on the question of negligence. The contention of the United States is that recovery under the tort claims act must be denied to the soldier and the administrator of the deceased soldier on the ground that claims arising out of the injury of or killing of soldiers is not covered by [fol. 56] the act. An alternative contention is that plaintiffs are precluded of recovery because the mother of the deceased soldier was awarded a death gratuity under existing law of $468.00 and the injured soldier was granted $27.60 per month disability compensation by the Veterans Administration on account of the injury that he had received.

The principal question in the case is whether the court shall read into the act an exception excluding soldiers from the right to recover under its provisions. I see no basis for reading such an exception into the act. Legislation is a matter for Congress, not for the courts; and the language used by Congress clearly covers soldiers as well as civilians.*

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*The pertinent language of the statute, 60 Stat. 843-844, is as follows:

"Sec. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States; sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accord-

It is neither reasonable not respectful to Congress for the courts to assume that the import of the general language used in the statute was not understood or that language excluding soldiers from the benefit of the act was omitted through inadvertance. The act was passed at a time when the country was deeply conscious of the rights and claims of soldiers. The greatest army in the history of the country was being demobilized but many hundreds of [fol. 57] thousands of men were still under arms, and it is hardly probable that Congress could have overlooked the fact that claims on their part would be covered by the general language used. Added to this is the fact that prior bills considered by Congress excluded claims compensable under the World War Veterans Act;* and it is fair to assume that these bills with their exclusions were before the draftsmen of this act. Then, too, the act itself, in Sec. 402(c), expressly mentions members of the military and naval forces as among those for whose acts liability is

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ance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances. * * *

(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim.

* H. R. 5373, introduced into the House July 21, 1941, 77 Cong. 1st Sess., S. 2221, introduced into the Senate, 77 Cong. 2d Sess., H. R. 6463 introduced into the House, 77 Cong. 2d Sess., January 26, 1942, and H. R. 181, introduced into the House January 3, 1945 and committed to the Committee of the Whole House and ordered to be printed Nov. 26, 1945, 79 Cong. 1st Sess., Union Calendar No. 392, all were tort claims bills and all contained a section setting forth exceptions in practically the same language as section 421 of the Federal Tort Claims Act hereinafter quoted, except that all of them contained an additional exception in the following language:

"(8) Any claim for which compensation is provided by the Federal Employees' Compensation Act, as amended, or by the World War Veterans' Act of 1924, as amended."

established, and in section 424(a) repeals the act of July 3, 1943, 57 Stat. 372, 31 USCA 223(b), which authorized the Secretary of the Army to settle claims against the United States, not exceeding $1,000, for damage caused by military personnel or civilian employees of the army: It is not reasonable to assume that the claims of soldiers were overlooked at a time when soldiers and their rights were so prominently in the public mind, when prior proposed legislation dealt explicitly with that matter and when the act itself repealed legislation under which limited relief could be granted them.

And it is not reasonable to assume that at the end of a victorious war, when the heart of the country was filled with gratitude to the soldiers for their achievements on the field [fol. 58] of battle, Congress would have passed a statute discriminating against them and leading to such absurd results as would be presented by the case at bar, if the position of the government is sustained. In this case the position of the soldiers was precisely that of their civilian father. They were not engaged in military duty, but were riding, as he was, in a privately owned automobile on a public highway. To say that he, the civilian, may recover, but that they must be denied recovery merely because they are soldiers would certainly come as a shock to one not familiar with legal refinements; and the shock would not be alleviated by the knowledge that the mother of the deceased had been awarded a death gratuity of $468.00 and the injured man disability compensation of $27.60 per month. It would be thought that they were entitled to these pension benefits under the laws of the United States just as the seaman is entitled to maintenance and cure from his vessel, as a sort of accident and health insurance incident to the relationship* and that the fact that these were received would constitute no reason for denying to the soldier the more substantial recovery to which any civilian would be entitled under like circumstances.

Another reason for holding that it was not the intention of Congress to exclude soldiers from the protection afforded by the act is that the act itself lists twelve exceptions to its application under the heading of exceptions and no such

* See *Smith* v. *United States* 4 Cir. 167 F. 2d 550.

exception is listed among them.* Not only is this true, but [fol. 59] one of the exceptions, (j), expressly refers to the military and naval forces and provides that any claim arising out of their combatant activities in time of war shall not be covered by the act. If it had been intended that claims on behalf of members of the military and naval forces should not be covered, the inclusion of exception (j) would certainly have suggested that express language be

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* The text of the act, 60 Stat. 845-846, is as follows:

"Exceptions. Sec. 421. The provisions of this title shall not apply to—(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance of the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused. (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter. (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer. (d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U.S.C., title 46, secs. 741-752, inclusive) or the Act of March 3, 1925 (U.S.C., title 46, secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States. (e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act, as amended. (f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States. (g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters. (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. (i) Any claim for damages caused by the fiscal operations of the treasury or by the regulation of the monetary system. (j) Any claim

used for that purpose." The rule applicable is elementary law and is well stated with citation of the controlling authorities in 50 Am. Jur. p. 455-456 as follows:

> [fol. 60]. "* * * where express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute. In such case, the inference is a strong one that no other exceptions were intended, and the rule generally applied is that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions or the enlargement of exceptions made."

For cases in which the rule has been applied, see *Moore Ice Cream Co.* v. *Rose, Collector*, 289 U. S. 373, 377; *Cunard Steamship Co.* v. *Mellon* 262 U. S. 100, 128; *Lapina* v. *Williams* 232 U. S. 78, 92; *Wood* v. *Wilbert* 226 U. S. 384, 390; *Equitable Life Society* v. *Clements* 140 U. S. 226, 233. In the case last cited, the Supreme Court, speaking through Mr. Justice Gray, in construing general terms of a statute governing life insurance policies as applicable to the case before the court, had the following to say with regard to the effect of a section prescribing specific exceptions:

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arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war. (k) Any claim arising in a foreign country. (l) Any claim arising from the activities of the Tennessee Valley authority."

The language of the Act is precisely the language contained in H. R. 181 to which reference has heretofore been made except that it omits the exception as to claims for which compensation is provided and in section (j) inserts the word "combatant" before activities.

Section 421 (j) as originally drawn excluded any claim arising out of "activities" of the military and naval forces or coast guard during time of war. It was amended on its passage through Congress to exclude only claims arising out of "combatant activities", (See 92 Cong. Record 10143), thus showing that the mind of Congress was expressly drawn to liabilities arising in connection with the military and naval forces.

"This construction is put beyond doubt by sec. 5986, which, by specifying four cases (two of which relate to the form of the policy) in which the three preceding sections 'shall not be applicable,' necessarily implies that those sections shall control all cases not so specified, whatever be the form of the policy."

What seems a conclusive reason for not reading into the act the exception suggested, however, is that this exception was originally contained in the tort claims act which was introduced into Congress as H.R. 181 January 3, 1945, and was omitted, with apparent deliberation, when that bill was incorporated as the Tort Claims Section of the Legisla- [fol. 61] tive Reorganization Act. See H.R. 181 and Report No. 1400 on the Legislative Reorganization Act. p. 30. where the following language appears:

"Attention is called to the fact that there is now on the House Calendar a bill (H.R. 181, 79th Cong.) almost identical with this title. The essential difference is that the House bill puts a maximum limitation of $10,000 on claims for which suit may be brought, whereas this title as reported by your committee contains no such limitation. The committee is of the opinion that in view of the banning of private claim bills in the Congress no such limitation should be imposed, and that with respect to this type of claim the Government should be put in the same position as any private party. For the information of the Senate the following statement from the House Committee report on H.R. 181 (H.Rept. No. 1287, 79th Cong., 1st Sess.), covering the history of this legislation and a summary of existing law is incorporated and made a part of this report:":

H. R. 181 contained thirteen exceptions in the section which became section 421 of the Tort Claims Act, one of which was as follows:

"(8) Any claim for which compensation is provided by the Federal Employees' Compensation Act, as amended, or by the World War Veterans' Act of 1924, as amended."

This exception was omitted from the Tort Claims Act when the others were written in as Section 421. In my opinion

the court is without power to write back into an act by interpretation a section which Congress has thus deliberately omitted. The only excuse for reading in an exception by interpretation is that Congress must be presumed to have intended that an exception apply; but Congress could not [fol. 62] be presumed to intend that an exception apply, when it deliberately struck the exception from the act upon its passage.

The foregoing conclusion is not answered by the fact that the exception in H.R. 181 related to claims for which compensation is provided by the World War Veterans Act of 1924 as amended, and not to soldiers' *eo nomine*. The only argument advanced for excluding soldiers from the benefit of the act is that provision is made for them elsewhere. The only provision made for them elsewhere, so far as compensation for injuries is concerned, is in the World War Veterans Act of 1924 as amended; and when Congress had before it a provision excluding claims covered by this act as amended and deliberately omitted it from the legislation as passed, the conclusion is inescapable that it was not intended to exclude soldiers from the benefit of the act even as to claims so covered.

The government places special reliance upon the decisions in *Dobson* v. *United States*, 2 Cir. 27 F. 2d 807 and *Bradley* v. *United States*, 2 Cir. 151 F. 2d 742. These cases were sufficiently distinguished by Judge Chesnut in his opinion in *Jefferson* v. *United States* 74 F. Supp. 209, 212-213, where he said:

> "But aside from the difference in wording between the Public Vessels Act and the Suits in Admiralty Act and the Tort Claims Act, it is to be importantly borne in mind that the last mentioned Act represents a marked departure by the United States with respect to the waiving of sovereign immunity. It is a comprehensive Act which, subject to the exceptions therein contained, acknowledges liability of the sovereign for injuries and damages to property and persons generally where the damage results from negligence in the performance [fol. 63] of duties by its employees. This comprehensive Act was passed subsequent to the various special Acts waiving immunity under certain conditions and to a limited extent, as in the Public Vessels Act and the Suits in Admiralty Act. By one of the exceptions it

does not apply to claims or suits in admiralty against the United States under the Suits in Admiralty Act, 46 USCA secs. 741-752 inclusive, or the Public Vessels Act, 46 USCA secs. 781-790 inclusive. But outside of the specific exceptions, as already noted, it does apply to 'any claim against the United States, for money only, accruing on and after January 1, 1945.'"

It should be noted that the claims in suit here do not arise out of injuries connected with the military service of plaintiffs, as was the case in *Jefferson* v. *United States* 77 F. Supp. 706. Entirely different considerations might operate to deny recovery in such case, as is suggested in the opinion of Judge Chesnut. Since the act does no more than give the right to sue the government and adopts the law of the state in which the injury has occurred with respect to the establishing of liability, the question arises, as to an injury caused by army service, whether under the law of the state there is any liability for such an injury. No such question is presented here; and the only ground upon which it could be answered in the negative does not exist with respect to an injury which has no connection with army service. In that case, liability would be held not to exist because of lack of basis in state law. Here, the only way in which liability can be avoided is to read into the statute an exception to language which admittedly covers the case, an exception which Congress evidently considered and decided not to incorporate in the act.

[fol. 64] It is urged that, if the act is construed to cover claims of military and naval personnel, it will result in a flood of litigation and disrupt discipline in the army and navy; but, even if this be true, the language of the act, being clear as it is, the matter is one for Congress and not for the courts. It may well be doubted, however, that any such fear is well founded. A reading of the exceptions will demonstrate that most claims which could cause trouble along the lines feared are expressly excepted; and, as for other claims, it might well be thought that less harm would result from allowing a soldier to sue on them than from denying him the rights accorded to every civilian. Certainly this is true of claims not arising out of service, which would be comparatively few in number and should not cause trouble. It is true, of course, that statutes are to receive a reasonable construction and that, in determining the legislative intent,

exceptions are to be read into their language to avoid injustice, oppression or absurd consequences. *United States* v. *Kirby*, 7 Wall. 482; *Lau Ow Bew* v. *United States* 144 U. S. 47; *Sorrells* v. *United States* 287 U. S. 435, 446-448. In this case, however, it can well be argued that more injustice and absurd consequences would result from the exception than from its omission. Congress evidently thought so when it omitted the exception contained in the text of H.R. 181 when adopting the text of that bill as the Tort Claims Act.

[fol. 65] JUDGMENT—Filed and Entered August 26, 1948

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5758

UNITED STATES OF AMERICA, Appellant,

vs.

WELKER B. BROOKS, Appellee.

Appeal from the District Court of the United States for the Western District of North Carolina

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgement of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of North Carolina, at Charlotte, for further proceedings in accordance with the opinion of the Court filed herein.

Armistead M. Dobie, U. S. Circuit Judge. Harry E. Watkins, U. S. District Judge.

[fol. 66] I dissent. John J. Parker, Senior Circuit Judge.

September 23, 1948, petition of appellee for a stay of mandate is filed.

59

ORDER STAYING MANDATE—Filed September 27, 1948

[Style of Court and Title omitted]

Upon the Petition of the appellees, by their counsel, and for good cause shown,

It Is Ordered that the mandates of this Court in the above entitled cases be, and the same are hereby, stayed pending the applications of the said appellees in the Supreme Court of the United States for writs of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the applications for the writs of certiorari are filed in the said Supreme Court within 30 days from this date.

September 25, 1948.

John J. Parker, Chief Judge Fourth Circuit.

[fol. 67] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5759

UNITED STATES OF AMERICA, Appellant,

versus

JAMES M. BROOKS, Administrator of the Estate of Arthur L. Brooks, Deceased, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina, at Charlotte

May 25, 1948, the transcript of record is filed and the cause docketed.

May 27, 1948, two orders extending the time to and including May 28, 1948, for filing record on appeal and docketing action are filed.

Same day, the appearance of W. S. Blakeney is entered for the appellee.

June 1, 1948, the appearance of David E. Henderson, United States Attorney, is entered for the appellant.

June 8, 1948, brief and appendix on behalf of the appellant are filed.

June 15, 1948, the appearance of Paul A. Sweeney is entered for the appellant.

June 24, 1948, consent of appellant to extension of time to file appellee's brief is filed.

[fol. 68] July 1, 1948, brief on behalf of the appellee is filed.

ARGUMENT OF CAUSE

July 5, 1948, (June term, 1948) cause came on to be heard, together with No. 5758, before Parker and Dobie, Circuit Judges, and Watkins, District Judge, and was argued by counsel and submitted.

OPINION—Filed August 26, 1948

Note: The opinion appears at page 41 of the record and is, therefore, omitted here.

[fol. 69] JUDGMENT—Filed and Entered August 26, 1948

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5759

UNITED STATES OF AMERICA, Appellant,

vs.

JAMES M. BROOKS, Administrator of the Estate of Arthur L. Brooks, Deceased, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of North Carolina, at Charlotte,

for further proceedings in accordance with the opinion of the Court filed herein.

Armistead M. Dobie, U. S. Circuit Judge. Harry E. [fol. 70] Watkins, U. S. District Judge.

I dissent. John J. Parker, Senior Circuit Judge.

September 23, 1948, petition of appellee for a stay of mandate is filed.

ORDER STAYING MANDATE—Filed September 27, 1948.

[Style of Court and Title omitted]

Note: This order appears at page 66 of the record and is, therefore, omitted here.

[fol. 71] STIPULATION

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. —

WELKER B. BROOKS, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent

JAMES M. BROOKS, Administrator of the Estate of ARTHUR L. BROOKS, Deceased, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent

Subject to this Court's approval, it is hereby stipulated and agreed, by and between counsel for the respective parties hereto that for the purpose of the petitions for writs of certiorari herein, the printed record may consist of the following:

1. Appendix to brief of appellant in the United States Court of Appeals for the Fourth Circuit.

2. The proceedings had before the United States Court of Appeals for the Fourth Circuit.

It is further stipulated and agreed that petitioners will cause the Clerk of the United States Court of Appeals for the Fourth Circuit to file with the Clerk of the Supreme Court a complete certified transcript of the record on each appeal in the Court of Appeals for the Fourth Circuit; and [fol. 72] that, in the event that the petitions for writs of certiorari are granted, the printed record shall consist of the proceedings in the court below and such portions of the complete transcripts of records on appeal in that court as the parties may designate.

It is further stipulated and agreed that in any of the briefs filed herein reference may be made to the records filed as hereinabove provided in the Supreme Court of the United States.

This the 23 day of September, 1948.

W. S. Blakeney, Counsel for Petitioners; Philip B. Perlman, Counsel for Respondent.

[fol. 73] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to brief of appellant and the proceedings in the said Court of Appeals in the therein-entitled causes, as the same remain upon the records and files of the said Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Court of Appeals in said causes, made up in accordance with the stipulation of counsel for the respective parties, for use in the Supreme Court of the United States on applications for writs of certiorari.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 29th day of September, A. D., 1948.

Claude M. Dean, Clerk of the United States Court of Appeals for the Fourth Circuit. (Seal.)

[fol. 63] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 388

ORDER ALLOWING CERTIORARI—Filed January 3, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 64] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 389

ORDER ALLOWING CERTIORARI—Filed January 3, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.